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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5993

JOHN E. TEST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (App. 27-34) is reported at 486 F.2d 922.

JURISDICTION

The judgment of the Court of Appeals was entered November 1, 1973. (App. 35). A timely petition for

rehearing was filed on November 14, 1973, and was denied by the Court of Appeals on November 26, 1973. (App. 36). A Petition for Writ of Certiorari was filed on December 27, 1973, and was granted June 17, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, impose an affirmative burden to comply with the policy and rights of § § 1861 and 1862 that is broader in scope than the requirements of the jury composition cases such as *Whitus v. Georgia*, 385 U.S. 545 (1967), which prohibit "purposeful discrimination" or "systematic exclusion" of cognizable groups of the community from jury venires?

2. Did Petitioner fulfill the requirements of either the Jury Selection Act, 28 U.S.C. § 1867(d), or the "systematic exclusion" cases so that he should have been granted the right of discovery of documents and questionnaires concerning the master and qualified jury wheels for the grand and petit juries involved in his prosecution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VI provides in pertinent part:

In all criminal prosecutions the accused shall enjoy

> the right to * * * trial by an impartial jury of the state and district wherein the crime shall have been committed, * * *

28 U.S.C. §§1861-1869 (1968) [set out in the Appendix herein, at p. 1a-13a] 28 U.S.C. §1865(b)(1) (1972) [set out in the Appendix herein, at p. 14a] 28 U.S.C. §1869(h) (1972) [set out in the Appendix herein, at p. 14a]

STATEMENT

Petitioner was indicted on October 26, 1972, for the alleged violation of 21 U.S.C. §841(a)(1), the knowing and intentional distribution of lysergic acid diethylamide (L.S.D.). Petitioner, through counsel, filed pre-trial motions on January 2, 1973. Among these motions was a motion to dismiss the indictment and/or quash the petit jury array because of the alleged "systematic exclusion" of persons under the age of thirty-five, the Spanish-surnamed, Negroes, and students, (App. 11-12). Also filed was a motion to inspect the records utilized in connection with the selection of the master and qualified jury wheels. (App. 13-14). Attached to this motion was a sworn statement by counsel, in attempted compliance with the requirements of 28 U.S.C. §1867(d). This affidavit stated that in a trial in the state courts a hearing had been held on a similar claim, and the evidence showed that the Spanish-surnamed and persons between the ages of 20-30 were quite significantly underrepresented on the jury lists. Inasmuch as the state court in question had used a system of selection that was similar to that used by the U.S.

District Court for the District of Colorado, counsel stated that there was probable cause to believe that similar underrepresentations existed in the federal system. (App. 15-16).

A hearing was held on these motions in the district court on January 23, 1973. At that time, both the motion to inspect the jury records and the motion to dismiss the indictment were denied. (App. 24, 26). However, the district court conceded that blacks and persons with Spanish surnames were underrepresented. (App. 21, 24). Despite this concession, the court denied inspection of the jury records with the following comment:

> "You are not going to have a hearing in this case. If you want to look at the jury list sometime, we will hire some extra help and you come down and you can peek at it all you want to, but it's not going to be had in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname is not a pro rata percentage that those groups bear to the total population. We concede that." (App. 24).

Petitioner was convicted following a trial to a jury of twelve, and he was sentenced to a term of imprisonment of one and one-half years. The Court of Appeals for the Tenth Circuit affirmed his judgment of conviction. The Court of Appeals did not directly rule on the issues involved herein; rather, the opinion merely states that such issues were among those without merit. (App. 34).

SUMMARY OF ARGUMENT

1. The Jury Selection and Service Act of 1968 sets forth two major policies: (a) the jury should be a representative cross section of the community, and (b) each qualified person should have an equal opportunity to be considered for service, 28 U.S.C. § 1861. The Act utilizes two primary methods to achieve these policies. The first is random selection from voter lists of the district or division where the court is convened, and the second is the determination of disqualifications, exemptions, and excuses on the basis of objective criteria only. The Act seeks to eliminate the discretion that had previously been vested in jury commissioners by virtue of the key man system that was widely in use in the Federal courts. The key man system had provided opportunities for conscious discrimination, and, in addition, by its very nature it inevitably also led to unintentional discrimination.

Voter registration lists were selected as the primary source for prospective jurors' names. These lists were considered to be the most available sources across the country which also included a large enough number of names to assure a broad base for selection. It was recognized that in certain locations these lists would have to be supplemented by other lists when the cross-sectional goal of the legislation was not being achieved. 28 U.S.C. § 1863(b)(2). The Act therefore envisions an affirmative duty upon the administrators of the jury selection system to achieve as broad a cross section as is reasonably possible.

Objective standards for the determination of qualifi-

cation, exemption, and excuse were designed to work with random selection to achieve a representative cross-section of the community. No longer can jury commissioners or judges impose their own subjective standards of "common sense, intelligence, or probity," but rather the standards in the Act are the maximum allowed. The use of subjective standards was eliminated because they tended to frustrate the cross-sectional goal.

Congress recognized and felt that juries should reflect the community sense of justice. In order to do this, each segment of society must be represented. The intent of Congress was not only to eliminate discrimination, but also to achieve as representative a cross section as possible, without regard to past instances of discrimination. The elimination of purposeful discrimination was not the primary motivation behind the legislation.

Constitutional challenges were set apart from the Act. The authors felt that challenges would only lie for failure to achieve procedural regularity. Prejudice is not required to be shown by a party challenging the grand or petit juries; the only burden under the Act is demonstrating a "substantial failure" to comply with the provisions of the Act. 28 U.S.C. § 1867(a), (d).

The factual situation of the instant case clearly falls within the scope of Congress' intent. There was an admission by the chief judge of the district court that blacks and the Spanish-surnamed were underrepresented on the jury wheels. Such an underrepresentation should have triggered a search for supplemental source lists. 28 U.S.C. § 1863(b)(2). Since Congress' 1972 amendment, requiring an answer to the question on race by a

prospective juror on the questionnaire, was made in order to monitor the success of the statutory scheme in achieving a cross-section of the community, it is clear that a litigant challenging the results of the selection system does not have to satisfy the more onerous burden of demonstrating "purposeful discrimination." The Congressional intent was to achieve a broad cross-section; it is therefore enough for a challenging litigant to demonstrate that such a cross-section has not been achieved.

2. Petitioner fulfilled the threshold requirements of the Act concerning access to non-public jury documentation. He filed a sworn statement in compliance with § 1867(d); this statement alleged facts which, if true, would have constituted a substantial failure to comply with the requirements of the Act. The cases which have denied such discovery have done so either because no sworn statement was filed, the sworn statement was insufficient, or the allegations would not have constituted a violation of the Act. The statement herein has none of these deficiencies, so Petitioner should have been granted the opportunity to discover the pertinent jury documentation. Only through such inspection could he attempt to prove his claim of significant underrepresentation of blacks, Chicanos (the Spanish-surnamed), and other groups. The case should therefore be remanded for an evidentiary hearing on Petitioner's claim, and he should be given access to the jury wheels, etc.

Furthermore, Petitioner made out a claim of sufficient constitutional dimension to warrant his being granted access to the jury lists regardless of whether the Jury Act is broader in scope and intent than the

constitutional decisions, which require a showing of systematic exclusion or purposeful discrimination. The concession by the district court that the Spanish-surnamed were underrepresented and the thrust of Petitioner's argument that the voter registration lists were being used in a discriminatory fashion constitute sufficient evidence to merit an evidentiary hearing on Petitioner's allegations, and to afford him an opportunity to inspect the relevant jury documentation.

ARGUMENT

I. BECAUSE THE LEGISLATIVE HISTORY TO THE JURY SELECTION AND SERVICE ACT OF 1968 MAKES CLEAR THAT THE ACT IMPOSES AN AFFIRMATIVE DUTY UPON THE SELECTION PROCESS THAT IS GREATER THAN MERELY NEGATING DISCRIMINATION, A LITIGANT CHALLENGING COMPLIANCE WITH THE ACT IS NOT REQUIRED TO DEMONSTRATE SYSTEMATIC EXCLUSION OF A COGNIZABLE GROUP IN THE COMMUNITY.

The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* (82 Stat. 53) states in § 1861:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United

> States, and shall have an obligation to serve as jurors when summoned for that purpose.

Section 1862 states:

> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin or economic status.

Section 1863 implements these sections by requiring each district court to formulate a written plan for the random selection of grand and petit jurors. This plan "shall be designed to achieve the objectives of sections 1861 and 1862." 28 U.S.C. § 1863(a). Briefly, the requirements of § 1863 are that the plan must establish a jury commission or authorize the clerk to manage the selection process. While allowing for local variation, each plan must specify whether voter registration lists or the lists of actual voters shall be the source for the names of prospective jurors in the district or division. Each political subdivision is to be proportionally represented, and the plan must specify a procedure that will "ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes." 28 U.S.C. § 1863(b)(3). The names selected from the source lists must be placed in a "master jury wheel"; this wheel must contain one-half of one percent of the total number of persons on the basic source list, or, if this is too cumbersome, a smaller number, but no less than one thousand. 28 U.S.C.§ 1863(b)(4). The local plan must also specify those groups which are eligible for excuse or exemption, but only after a finding that the excuse or exemption of such persons would not be inconsistent with the aims of § § 1861 and 1862. 28

U.S.C. § 1863(b)(5) and (6). Upon review by the judicial council of the particular circuit, which review is to determine that the plan complies with the provisions of the Act, the plan is to go into effect. 28 U.S.C. § 1863(a). If the reviewing panel finds that the plan does not comply with the Act, it must direct the district court to remedy the defects.

While § 1863(b)(2) states that either the voter registration lists or lists of actual voters are to be the primary source for prospective jurors' names, it also states that "[t]he plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862." 28 U.S.C. § 1863(b)(2).

The Act further provides for the random selection of names from the master jury wheel, and the sending of questionnaires to these prospective jurors. 28 U.S.C. § 1864. The eligibility for service of persons who complete the questionnaires is to be determined on objective criteria based upon the responses to the questionnaire. 28 U.S.C. § 1865. Persons who qualify and are not otherwise exempt or excused are to be placed in a "qualified jury wheel," from which the ultimate grand and petit jury venires are selected, at random. 28 U.S.C. § 1866.

There is also a provision for challenging compliance with the Act, either by the defendant or the Attorney General in a criminal case, or by the parties in civil cases. 28 U.S.C. § 1867.

Despite the apparently clear language of § § 1861 and 1862, especially when read in conjunction with the language of § 1863(b) requiring the random selection of

a fair cross section of the community, and also requiring the supplementation of voter lists when they are inadequate to achieve the cross-sectional and non-discriminatory goals of §§1861 and 1862, the Court of Appeals for the Ninth Circuit has imposed a heavy burden upon any litigant challenging compliance with the Act.

In effect, these cases[1] require a showing of the systematic exclusion of a cognizable group from the jury pool, and hold that the use of voter registration lists as the source of prospective jurors is not invalid unless there is a showing of electoral discrimination against the group(s) in question. As such, these cases appear to adopt the constitutional doctrines set forth by this Court in its 14th Amendment decisions such as *Whitus v. Georgia*, 385 U.S. 545 (1967), and *Hernandez v. Texas*, 347 U.S. 475 (1954). At least one panel of the Second Circuit seems to have adopted this rationale. *United States v. Guzman*, 468 F.2d 1245 (CA 2 1972), cert. denied 410 U.S. 937.[2]

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[1] See *United States v. James*, 453 F.2d 27 (CA 9 1971); *United States v. Bennett*, 445 F.2d 638 (CA 9 1971), cert. denied 404 U.S. 1023; *United States v. Parker*, 428 F.2d 488 (CA 9 1970), cert. denied 400 U.S. 910.

[2] Part of the *Guzman* decision may be based upon the Second Circuit's serious doubts as to whether the age groups involved were "cognizable" for the purposes of the Act, particularly since age is not one of the factors mentioned in §1862. 468 F.2d at 1248.

The rationale of the Ninth Circuit cases is also open to question, for the operative language of *United States v. Parker*, 428 F.2d 488, concerning the requirement of showing "systematic exclusion" was made with respect to a grand jury that had been empanelled *prior* to the effective date of the Jury

The issue thus presented in this case is whether the intent of the Jury Selection Act is broader than the systematic exclusion cases. If the Solicitor General is correct in his contention that Petitioner did not really allege or make a showing of systematic exclusion,[3] and if the Jury Selection Act is not broader in scope than *Whitus*, etc., then Petitioner was not prejudiced by the district court's failure to allow inspection of the jury wheels and questionnaires. If, on the other hand, the Act imposes an affirmative burden to formulate a plan for juror selection that does more than merely negate discrimination, but instead as nearly as possible achieves a representative cross-section of the community, then Petitioner was prejudiced by the failure to allow

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Selection Act of 1968. Indeed, the Court of Appeals there recognized this distinction and did not discuss the challenge under the standards of the 1968 Act. Thus, while the Court of Appeals did hold that the use of voter registration lists was not improper *per se*, it also stated that such use was not "*constitutionally* invalid." 428 F.2d at 489. The later cases cite *Parker*, but they are also at least partly based upon the failure of the defendants involved to offer any proof to substantiate their claims of underrepresentation. See *United States v. James*, 453 F.2d 27, 29; and *United States v. Bennett*, 445 F.2d 638, 641. These cases are therefore distinguishable from the case at bar to the extent that they rely on the *Parker* standard as being proper under the Act, and they are also distinguishable on the question of proof presented. Here, any attempt to offer proof was completely frustrated by the district court's denial of the motion to inspect the jury wheels and questionnaries. See argument II, *infra*.

[3] Memorandum for the United States, at 5-6.

inspection, regardless of whether he made out a valid claim of systematic exclusion.[4]

This Court has not yet directly decided this issue. While the Court did speak of "purposeful discrimination" in *Hamling v. United States*, ___ U.S. ___, 94 S. Ct. 2887 (1974), the issue there raised by petitioners was the exclusion of persons under the age of twenty-four from the master jury wheel. Since the master wheel had last been refilled in 1968, and since Hamling's trial took place in 1971, all persons on the petit jury venire must have been at least twenty-four.[5] The question presented in *Hamling* was thus how often the master jury wheel had to be refilled. This Court stated that

> some play in the joints of the jury selection process is necessary in order to accommodate the practical problems of judicial administration. Congress could reasonably adopt procedures which, while designed to assure that "an impartial jury [is] drawn from a cross-section of the community," *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946); *Smith v. Texas*, 311 U.S. 128, 130 (1940), at the same time take into account practical problems in judicial administration. Unless we were to require the daily refill-

[4] Several decisions have pretermitted the question of whether the Jury Selection Act is broader than the "systematic exclusion" cases. See, *e.g.*, *United States v. Dellinger*, 472 F.2d 340, 365 (CA 7 1972); *United States v. Deardorff*, 343 F.Supp. 1033 (S.D.N.Y. 1971), aff'd sub nom. *United States v. Kahn*, 472 F.2d 272 (CA 2 1972), cert. denied 411 U.S. 882 (1973). But see *United States v. McDaniels*, 370 F.Supp. 298, 301-302 (E.D.La. 1973), which determined that significant underrepresentation is all that a defendant must show in order to prevail on a challenge under the Act.

[5] Brief for Petitioner Hamling, at 87.

> ing of the jury wheel, Congress may necessarily conclude that some periodic delay in updating the wheel is reasonable to permit the orderly administration of justice. (footnote omitted) ___ U.S. ___, 94 S.Ct. at 2917-2918.

This Court then held that the focus of a challenge must be on the makeup of the master wheel at the time of its refilling, and if it is not discriminatory at that time, then a "purposeful discrimination" has not occurred. While this Court did cite *Whitus v. Georgia* 385 U.S. 545 (1967); *Avery v. Georgia*, 345 U.S. 559 (1953); and *Alexander v. Louisiana*, 405 U.S. 625 (1972), it is clear that the thrust of *Hamling* was directed at administrative convenience and necessity, and not to whether the scope of the Act is broader than these cases, particularly when racial and other classes were involved. Indeed, the question of the scope of the Act was not briefed or apparently argued.[6]

The questions involved herein therefore require that we go beyond the apparently clear language of §§ 1861-1863 and examine the legislative intent as demonstrated by the legislative history to the Act.

The bill that eventually became the Jury Selection and Service Act of 1968 was introduced in the Senate in 1967 by Senator Joseph D. Tydings, Chairman of the Sub-committee on Improvements in Judicial Machinery of the Committee on the Judiciary. As part of a proposed review of procedures for the selection of jurors in federal courts, Sen. Tydings held hearings on seven proposed bills before his subcommittee.[7]

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[6] Brief for Petitioner Hamling, at 87-94.

[7] "Federal Jury Selection," Hearings Before the Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, 90th Cong., 1st Sess. (1967) [hereinafter referred to as "Hearings, 'Federal Jury Selection' "].

The history of jury selection in the federal courts prior to 1967 is surprisingly barren for a system for which it is an "established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

The First Judiciary Act of 1789 established that jurors in federal courts would be selected in conformity with the standards used in each state. This act also required that the system used in the federal courts would be that of the States as of the date of enactment. An act of 1800 amended this static conformity date from 1789 to 1800. The Act of July 20, 1840, departed from the static conformity date and allowed each federal court to change its procedures from time to time to be current with changes in state law.[8]

The 1875 Civil Rights Act modified these procedures by prohibiting disqualification from jury service because of race, color, or previous condition of servitude. Selection procedures continued basically in this vein until the 1940's. During the interim, criteria for qualification had multiplied to include age, citizenship, good moral character, ability to read, write, speak or understand English, mental capacity, status as a property owner, residence, sex, status as a taxpayer, sobriety, status as a voter, criminal record, status as a poll taxpayer, and prior jury service. Exemptions had also increased, so that by 1941 there were sixty-eight classes of exemptions in the various states.[9]

[8] 114 Cong. Rec. 6608-6609 (1968) (remarks of Sen. Tydings).

[9] *Id.* at 6609.

In 1941, the Judicial Conference of the United States appointed a committee, under the chairmanship of Judge John C. Knox, to study the manner of selection of jurors in the federal courts. The committee's report, commonly referred to as the "Knox Report," was completed in 1943. One of the recommendations of that committee was the adoption of uniform qualifications for jurors in federal courts.[10] In 1948 Congress partially created independent federal qualifications for jurors, but the criteria of the states was also continued, and no guidelines for the actual selection process were provided.[11] 28 U.S.C. § 1861 et seq. (1948 ed). In 1957, as part of the Civil Rights Act, § 1861 of title 28 was amended to establish totally independent federal qualifications for federal jurors. All reference to state qualifications was eliminated.[12] However, these standards were not administered uniformly; some courts treated them as minimum standards to which subjective notions of commonsense and probity were often added.[13] The Judicial Conference undertook a new review to update the Knox report. This 1960 report demonstrated that problems still remained in selecting

[10]Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States, 42 F.R.D. 353, 354-55 (1967) [hereinafter referred to as the "Kaufman Committee Report"].

[11]114 Cong. Rec. 6609 (1968) (remarks of Sen. Tydings).

[12]*Ibid.*; Kaufman Committee Report, 42 F.R.D. at 355.

[13]S. Rep. No. 891, 90th Congress, 1st sess., at 9.

for the names of prospective jurors. the source the report recommended that the stan- Nonetheless ection and the source of names should be dards of se ound discretion of each district rather than left to the imposing some kind of uniformity.[14] to legislatio a bill proposed by the Judicial Conference In 1962, ced in the 88th Congress, and by 1966 was introd hirty-four bills pending that concerned the there were [15] In 1966, the House passed H.R. 14765, jury system e Administration's 1966 civil rights bill. title I of filibustered in the Senate, it pointed up While it wa for reform. the necessit

ing obvious the need for reform was the Also ma the en banc Fifth Circuit in *Rabinowitz v.* decision of *United Stats*, 366 F.2d 34 (CA 5 1966). That case held the operation of the "key man" system in one ived the defendants of a jury that was a district dep cross section of the community. The key representati used certain persons as suggesters of the man syste rospective jurors. The defects of such a names of later pointed out by a number of witnesses system were gs' committee hearings. Among them was at the Tydi S. Lord, III, of the eastern district of Judge Josep whose district used the key man system. Pennsylvani He stated:

> I do no doubt that the key man method may result in juries which are fairly representative of the com nunity of which they are part, both geograph ally and in terms of those infinitely

[14]Kaufma Committee Report, 42 F.R.D. at 355-56.

[15]*Id.* at 56-57; 114 Cong. Rec. 6609 (remarks of Sen. Tydings).

> more subtle characteristics vaguely referred to as political, social, ethnic, and economic background. However, the opportunities for unintentional abuse of the system are grave.* * * Even when the key men are so chosen that they do represent all segments of our pluralistic citizenry, there is no inherent guarantee that they themselves will recruit and recommend individual jurors who collectively embody the will of the community. Even more unlikely is it that the system can continue to function with evenhanded representative justice. For every time the community changes, in terms of the political outlook of its members, their economic and social status, their ethnic and cultural composition, and of course their geographical distribution, the perpetuation of the same key men works obvious impropriety. Yet how can court administrators and judges gauge subtle, nuanced changes in societal attitudes and find the appropriate key men to accompany these increasingly fluid developments.[16]

The bill that eventually became the Jury Selection and Service Act of 1968 was drawn in response to these problems, as well as others that were recognized. It was drafted by the Judicial Conference's Committee on the Operation of the Jury System, chaired by the Hon. Irving R. Kaufman of the Court of Appeals for the Second Circuit. In intent it was virtually identical to the Administration proposal, S. 1319, which was title I of the Civil Rights Act of 1967.[17] Virtually all of the thirty-nine witnesses before the Tydings' subcommittee supported one or the other of these two bills and opposed the other five proposals. At the conclusion of

[16]Hearings, "Federal Jury Selection," at 75-76, quoted in S. Rep. No. 891, at 11.

[17]Hearings, "Federal Jury Selection," at 23-35, 37-38.

the hearings, the subcommittee decided to report out an amended version of the Judicial Conference bill, for it gave more flexibility to the various districts,[18] and this bill eventually became law.

The bill, as amended, embodied two basic themes: (1) random selection from voter lists of the district or division where the court was convened, in order to assure a representative cross section of the community on the jury wheel, and (2) objective bases for determining qualification for, and exemption and excuse from service.

> These principles provide the best method for obtaining jury lists that represent a cross section of the relevant community and for establishing an effective bulwark against impermissible forms of discrimination and arbitrariness. S.Rep. No. 891, at 15; H.R. Rep. No. 1076, 90th Congress, 2d sess., 1968 U.S. Code Cong. & Ad. News 1792, 1793 (1968) [hereinafter referred to as "H.R. Rep. No. 1076"].

See also S. Rep. No. 891, at 9, 25-26; H.R. Rep. 1076, at 1792, 1798.

The bill was designed to do away with the discretion that had previously been vested in the jury commissioners, and it was also intended to give each qualified person an equal opportunity to be considered for jury service, as well as broadening the base for selection in order to achieve the cross sectional goal. Thus, Congressman Celler, Chairman of the House Committee on the Judiciary, which considered and amended the proposed legislation after its passage by the Senate, stated on the floor of the House:

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[18]S. Rep. No. 891, at 13.

> [T]he true administration of justice is the firmest pillar of good government. This legislation embodies that belief. It is committed to the goal of impartial administration of justice and the essential value of broad community participation in Federal juries. 114 Cong. Rec. 3991 (1968).

In order to achieve these goals, three basic means were formulated. The first was random selection from the source lists. Random selection was decided upon in order to do away with the discretion that was inherent in the key man system, and it was also intended to do away with any further inducements for discrimination.

> [R]andom selection eliminates the key man system and ensures that jurors will be selected without regard to race, wealth, political affiliation, or any other impermissible criterion. It is for this reason that random selection traditionally has been the method used to select juror names from the qualified jury wheel. The bill simply extends this principle backward in time to encompass the method used to obtain the names placed in the qualified jury wheel. It thus virtually eliminates the possibility of impermissible discrimination and arbitrariness at all stages of the jury selection process, and thereby tends to ensure that the jury list will be drawn from a cross section of the community.
>
> S. Rep. No. 891, at 16 (footnote omitted).

See also the testimony of Judge Kaufman before the Tydings subcommittee, Hearings, "Federal Jury Selection," at 265.

The need for the elimination of the key man system was not restricted to the abhorrence of intentional discrimination. Rather, the system also allowed unintentional discrimination. See, *e.g.*, *Rabinowitz v. United*

States, 366 F.2d 34 (CA 5 1966). Another witness before the Tydings subcommittee, Prof. Edwin S. Mills of Johns Hopkins University, who had conducted a statistical study of a key man system in the U.S. District Court for the District of Maryland from December, 1958 to December, 1961, testified as to the inevitable effects of such a discretionary system:

> It is almost humanly impossible to avoid biases of the kind * * * found when jurors are selected by the key man system. First, people known to prominent individuals or associated with almost any kind of organization will display an occupational bias. Second, it is well known among statisticians that any sampling procedure involving human discretion almost inevitably leads to biased results. No matter how conscientiously they try to choose randomly, human beings almost always choose biased samples.
>
> Hearings, "Federal Jury Selection," at 75-76, quoted in S. Rep. No. 891, at 11.

The Kaufman Committee also recognized the defects of the key man system:

> Perhaps more important, the haphazard nature of the process does not insure that each qualified citizen will have an opportunity equal to that of every other qualified citizen to be considered for jury service. Kaufman Committee Report, 42 F.R.D. at 361.

Secondly, voter registration lists were selected as the primary source list because they were the single source most uniformly available across the country that at the same time provided as broad a base for selection as was reasonably possible. The Senate Report to the legislation states the reasoning behind the selection of such lists in the words of then-Attorney General Ramsey Clark:

> We looked at every type of list we could find. We looked at post office addresses, at Civil Service Commission lists, at Social Security lists, and we considered telephone books, and a city directory sort of list, and we couldn't find any list that would be across the country nearly as good as the voter list. Hearings, "Federal Jury Selection," at 43, quoted in S. Rep. No. 891, at 16.

Professors Harry Kalven and Hans Zeisel of the Chicago Jury Project also testified in support of the use of voter lists:

> Now which lists are under consideration? Telephone lists have the disadvantage that they have an economic bias. * * * City directories, to the extent that they exist, are a good source, although they have the difficulty that they contain also non-U.S. citizens, and therefore have a lot of names which have to be screened out. * * * But the major argument against using city directories is that they are available only in very few cities. * * * When all is said and done, we believe that the voter registration list is by far the most desirable list as the foundation of the juror selection process. We don't mean necessarily that the voter list should be the only one. If it is found seriously deficient, as it might be in some areas, then by all means it should be supplemented by other lists, but I think from the point of view of the statistician who wants to obtain a representative cross section of the population, the voter list is by far the most desirable source. Hearings, "Federal Jury Selection," at 131, quoted in S. Rep. No. 891, at 16-17.

The voter lists were recognized to have limitations,[19] but they were still selected, partly because of their availability, and partly because they provided a sufficiently broad source of names. The Kaufman Committee, for example, felt that any deficiency in the voter lists could be remedied by the supplementation provision of § 1863(b)(2). Kaufman Committee Report, 42 F.R.D. at 361-62; statement of Hon. Irving R. Kaufman, Hearings, "Federal Jury Selection," at 253.

Finally, objective standards for qualification, exemption, or excuse were designed to work with random selection to produce juries that would result in a representative cross-section of the community.

> The second principle—determination of disqualifications, excuses, exemptions and exclusions on the basis of objective criteria only—is designed to work with random selection to produce juries that represent the community fairly. In essence, this principle would prohibit the widespread current practice of imposing qualifications above and beyond those specified by Congress. S. Rep. No. 891, at 17-18; H.R. Rep. No. 1076, 1968 U.S. Code Cong. & Ad. News at 1795.

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[19]Professors Kalven and Zeisel themselves testified that census lists would provide a better source from a statistical point of view, were they available and if they could be updated in the later years of each decade. Hearings, "Federal Jury Selection," at 139. See also the statement of Lawrence Speiser, Director of the Washington, D.C., office of the American Civil Liberties Union, who said that the sole use of voter registration lists "narrow[s] the base of jury selection and in so doing cast[s] aside the persuasive evidence that jury service is a powerful means of education in the democratic process, even for those previously apathetic about their civic responsibilities." Hearings, "Federal Jury Selection," at 334.

The Senate and House Committees on the Judiciary found that the use of subjective standards allowed too much opportunity for bad faith interpretation by the clerk or jury commissioners:

> [I]n districts where subjective screening takes place now, the judges of the Judicial Conference Committee learned that a "prospective juror may be considered unfit for jury service because a clerk thinks his appearance is sloppy, or his [formal] education is deficient, or because he is not very articulate, or speaks with an accent, or appears nervous. * * *" Impressions such as these are likely to form the basis for a stereotype of a "good juror" that will be used by interviewers to reject all who do not meet its narrow criteria. Thus, even if interviewers always act in good faith, they will tend to produce distorted juries that do not speak with the voice of the community.
>
> In addition, the undefinable contours of subjective criteria provide opportunities for discrimination by the occasional official who acts in bad faith.
> S. Rep. No. 891, at 19 (footnote omitted).

See also the testimony of Judge Kaufman, Hearings, "Federal Jury Selection," at 266, and that of Joseph L. Rauh, Jr., general counsel, Leadership Conference on Civil Rights, *id.* at 303-304. In addition, such subjective standards as "common sense, intelligence, information and probity" were found to be unworkable. S. Rep. No. 891, at 19; testimony of Judge Kaufman, Hearings, "Federal Jury Selection," at 261, and the testimony of Judge Lord, who stated

> that when you get into relative terms, like common sense, you are dealing with very, very dangerous language and with very, very dangerous standards. If we are going to have a true random

> cross section and truly random selection, then I think the qualifications should not be dependent on such things, such intangibles, as probity, common sense, and so forth. *Id.* at 77, quoted in S. Rep. No. 891, at 24.

Furthermore, it was recognized that the use of such subjective standards would likely defeat the cross sectional goal of the legislation. *Ibid.* Joseph L. Rauh, Jr., made a similar statement that illustrates much of the testimony received by the Tydings committee:

> The creation of additional tests concerning intelligence, integrity, morality and common sense would negate the very principle of equality reflected in the phrase "a jury of his peers." * * * Worst of all, by creating a vague subjective test * * * the mechanical application of random sampling is defeated and the certainty of equality predicated on objective tests is totally lost. *Id.* at 24-25, quoting Hearings, "Federal Jury Selection," at 290.

The Kaufman Committee came to a similar conclusion. It said in its report:

> The committee is in accord with those who emphasize the importance of obtaining competent jurors, but it believes that "the desire for competency must not be pursued to the extent that a fair cross-section is prevented." *Rabinowitz v. United States*, 366 F.2d 34, 55 (5th Cir. 1966). Kaufman Committee Report, 42 F.R.D. at 363.

Similarly, excuse categories were limited, both in order to "upgrade the competence" of juries by having fewer professional people excused, as well as to enhance the cross sectional goal. S. Rep. No. 891, at 23-24; H.R. Rep. No 1076, 1968 U.S. Code Cong. & Ad.

News at 1797, 1805; testimony of Prof. Kalven and Zeisel, Hearings, "Federal Jury Selection," at 132-33. Therefore, juror fees were increased:

> The subcommittee hearings established a record of unanimous support for increases that would make jury and witness service less burdensome. To the extent that the burden is diminished, hardship excuses may decline with consequent enhancement of representative participation on juries. The testimony of William Walsh, chairman-elect of the American Bar Association's Section of Criminal Law, is illustrative:
>
> "It should not be a matter of financial sacrifice for a man to serve as a juror. Otherwise qualified jurors, whose salary would be affected by jury service, try to take advantage of other grounds for excuse from jury service when their real reason for requesting relief is economic hardship." S. Rep. No. 891, at 36 (footnote omitted).

The intent of Congress was therefore to obtain as broad a base as possible for jury service and to remedy the defects of the key man system. Above all, moreover, there was a recognition of and a dedication to the proposition that the jury should reflect the community sense of justice. Thus, the committee reports state:

> Jury performance will be enhanced as well by closer approximation of the cross sectional goal under the bill. It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are

supposed to represent. *Id.* at 24; H.R. Rep. No. 1076, 1968 U.S. Code Cong. & Ad. News at 1797.

Judge Kaufman made a similar statement:

> If the law is to reflect the moral sense of the community, the whole community—and not just a special part—must help to shape it. If the jury's verdict is to reflect the community's judgment—the whole community's judgment—jurors must be fairly selected from a cross-section of the whole community, not merely a segment of it. Hearings, "Federal Jury Selection," at 256.

And see the comments of Congressman Rodino, a member of the House Judiciary Committee, on the floor of the House:

> A just verdict is most likely when the panel properly reflects a cross section. It is no more desirable to have a panel composed entirely of bankers and executives than it is to have one consisting only of laborers. 114 Cong. Rec. 4000-4001 (1968).

In order to achieve this cross-section, a provision was contained in the Act for supplementation of the voter lists when the latter failed to fairly represent the community:

> The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. 28 U.S.C. § 1863(b)(2).

As originally passed by the Senate, this subsection allowed the total substitution of other sources for the voter lists if supplementation would not be sufficient. The Senate Report states:

> The bill requires that the voter lists be supplemented by other sources whenever they do not adequately reflect a cross section of the community. * * *
>
> The voting list requirement, together with the provision for supplementation or substitution, is therefore the primary technique for implementing the cross sectional goal of this legislation. The bill uses the term "fair cross section of the community" in order to permit minor deviations from a fully accurate cross section. The voting list need not perfectly mirror the percentage structure of the community. *But any substantial percentage deviations must be corrected by the use of supplemental sources.* Your committee would leave the definition of "substantial" to the process of judicial decision. S. Rep. No. 891, at 17. (emphasis added).

The comment to section 1863 states:

> Subsection (b)(2) [of § 1863] contains the fundamental requirement that voter lists be used as the basic source of juror names. * * * Moreover, *the bill recognizes that in some areas voter lists of all kinds may be insufficient to implement the policies of the act, by reason of local voting practices. Where that is true, the plan must prescribe other sources to supplement the voter lists. Id.* at 27 (emphasis added).

The House changed this subsection to make clear that only supplementation of the voter lists, rather than total supplantation in some cases, was permitted. However, the House Report contains the same language as above in its comments on the bill. 1968 U.S. Code Cong. & Ad. News 1792, at 1794, 1799-1800.

The intent of this subsection is further pointed out by a colloquy between Senator Ervin and Attorney General Clark at the Senate subcommittee hearings. Senator Ervin questioned the need for § 1862 if random selection was designed to achieve the cross-section objective, and the Attorney General replied that § 1862 contained the standards that had to be looked to in evaluating the effectiveness of the selection procedures:

> *Attorney General Clark:* * * * [T]he bill recognizes the possibility that there may be areas where [a fair reflection of the community] is not the fact, and it instructs the Judicial Council to provide a balance.
>
> *Senator Ervin:* In other words, you are not satisfied that it selects them at random and that is the purpose in putting in these other things? Is that the object in putting them in?
>
> *Attorney General Clark:* No, the selection at random is all right if your list is all right. The question is whether your voter list is all right. If it is, then the procedure is adequate in that jurisdiction. If it is not, then the Judicial Council would have to look to a supplementation of the list.
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> Hearings, "Federal Jury Selection," at 60.[20]

See also the Kaufman Committee Report, 42 F.R.D. at 361-62.

This and other portions of the legislative history make it clear that the Jury Selection Act was designed

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[20]While Attorney General Clark's comments were in regard to S. 1319, the Administration bill, its provisions were very similar to that of S. 989, the bill that eventually passed. *Compare* § 1864(a) of S. 1319 *with* § 1863(b)(2) of S. 989. *Id.* at 24,30. See also *id.* at 171 (testimony of Prof. Kalven), and the statement of William L. Marbury, *id.* at 90.

not only to eliminate discrimination, but also to seek as representative a cross-section as possible. Congress was not only concerned with meeting constitutional requirements; it also wanted to make this legislation a model of fairness in achieving a truly representative jury – one representative of all segments of the population – without regard to whether there was evidence of past discrimination.

Thus, Congressman McCulloch, of the House Committee on the Judiciary, stated:

> If purposeful discrimination were the sole basis for this legislation, perhaps the need would not be clear; but the impact of S. 989 is much greater than that of civil rights legislation.
>
> For the real issue in this bill is whether a jury trial should be a trial before aristocrats or a trial before our peers. Thus the issue transcends our present problems of racial discord. The bill asks the question whether a nation dedicated to representation of the people in its legislative halls will adhere to the same principle in its courts.
>
> S. 989 says that it must. I agree. 114 Cong. Rec. 3992 (1968).

Judge Kaufman stated before the Tydings subcommittee:

> Now for the first time in our history, Congress has an opportunity to sweep away the injustices in the present system–the discrimination against those who do not live adjacent to the courthouse, against minority groups, and against the poor–and to create a uniform jury-selection system, something that the judges have sought for 23 years.
>
> Congress now has the opportunity to make Federal jury service not an irritating burden to be borne

few who repeatedly serve, but an opportunity ost Americans to participate in the most vital on of government, the meting out of justice.

ney General Clark, in speaking on the defects of n present system of selection, answered the g question from Senator Tydings:

or Tydings: Have there been any notable aces where justice has not been done because justie jury selection procedures now used in the al courts?

ney General Clark: Well, when you say e has not been done, if you mean reversible that is one thing. If you mean a failure to reflect all of the qualities of the community, I would consider an injustice in the system, I would say, "Yes, this has been something ve see in many districts across the country." something that we see almost inherently in eyman system, and particularly in a major politan area.

45; see also, *id.* at 59.

ney General Clark, in introducing the Admin-'s 1967 Civil Rights Act, made this comment ing title I (S. 1319), which was virtually in intent to the bill that became law.[21]:

[the present] system appears not to have ted unconstitutionally, in some districts representation on juries has been substan-

[21] S. less than the proportion of Negroes in the unity, and other classes have sometimes been quately represented on juries. Where such rities occur they create an impression of

ep. No. 891, at 15.

> unfairness in the judicial system of the United States—an impression which should be scrupulously avoided if we are to foster respect for the rule of law. 113 Cong. Rec. 3954, 3955 (letter of Attorney General Clark) (1967).[22]

Clearly, Congress was seeking to achieve the best and fairest selection system possible, one that would not only be fair for the litigants, but also would foster respect for the law. Congressman Rodino, for example, after stating that a defendant under the then-existing system might be satisfied to challenge the system and have his indictment dismissed, also stated:

> However, the interests of all concerned—of society as well as the litigants—would best be served if, at the outset, the jury-selection process had been free from actual unfairness and from the appearance of unfairness. * * * 114 Cong. Rec. 4001 (1968).

Similarly, Congressman Mathias of the House Committee on the Judiciary stated:

> Certainly, if people have some doubt that they can get absolutely impartial justice, and if they have any question about the administration of justice, then properly I think they would have a lack of confidence in the basic institutions of our Government. This bill will remove some of the questions that have arisen about the ways in which juries are selected and about the possibility that a jury may have some prejudice or bias which would affect the judgment of fact in a given case.* * *

[22]See also Hearings, "Federal Jury Selection," at 288 (statement of Joseph L. Rauh, Jr.); *id.* at 229 (testimony of Eastman Birkett, Assoc. of the Bar of the City of New York); *id.* at 244 (statement of William L. Taylor, Staff Director, U.S. Commission on Civil Rights).

> This bill removes the question of confidence in the judicial system. It insures that there will no longer be any juries composed of an elite, but that every man, in fact, will be judged by his peers, by his equals. This is the thrust and this is the essence of this bill. 114 Cong. Rec. 3992 (1968).

It is clear, then, that Congress was affirmatively seeking to achieve as broad an array as possible in the jury selection process; it was seeking to bring into the initial source list as many persons as could be reached with administrative feasibility. The provisions for flexibility in the number in the master jury wheel (§ 1863(b)(4)), the "periodic" refilling of the master jury wheel (*ibid.*), and the flexibility for a plan for each district (§ 1863(a)) were all intended to insure administrative feasibility. Cf. *Hamling v. United States, supra.* However, the primary intent of the Act is clear, and administrative feasibility cannot supervene or counter it. That intent was that Congress was not only seeking to eliminate discrimination against any group, but was also seeking to insure that all groups in the population would have equal representation in the source list—or at least as equal a representation as was reasonably possible.

It is also abundantly clear that the provisions of §1863(b)(2) impose a duty upon the system to affirmatively seek out other sources for names if any group or groups are not adequately represented. The legislative history states that such supplementation is required when there is a "significant percentage deviation" from an accurate cross section. S. Rep. No. 891, at 17, 27; H.R. Rep. No. 1076, at 1968 U.S. Code Cong. & Ad. News 1794, 1799-1800 [quoted *supra*, at

281. While systematic exclusion has often been demonstrated in the past by a showing of percentage disparities, *Whitus* v. *Geogia, supra; Hernandez v. Texas, supra*, it would seen that § 1863 (b) (2) does not incorporate this definiton into the statute. First, Congress showed a desire to set constitutional claims aside and apart from the statutory challenge procedure. Thus, § 1867(e) states:

> The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime,* * * may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

The House Report states that this section

> makes clear that the act will not preclude any person or the United Sates from asserting rights created by other stautes or for enforcing constitutional rights. 1968 U.S. Code Cong. & Ad. News at 1806; see also S.Rep. No. 891, at 35.

Furthermore, Congress foresaw that the nature of a challenge under the Act would be different from a constitutional challenge; it felt that "procedural regularity is the measure of the validity of the selection system. It is an appropriate measure since the bill sets up a largely mechanical process in which the role of human discretion is minimized." S. Rep. No. 891, at

34; H.R. Rep. No. 1076, at 1968 U.S. Code Cong. & Ad. News 1805.[23] The House also amended the bill to eliminate a requirement of a demonstration of prejudice by a challenging party. The House committee felt that such a requirement was more stringent than that even required for a constitutional challenge, and it also felt that such a requirement would "unduly burden the procedure established by the bill for challenging noncompliance." 1968 U.S. Code Cong. & Ad. News. at 1806; 114 Cong. Rec. 3991 (remarks of Representative Celler) (1968). The burden thus remaining for a challenging party is to show that "there has been a substantial failure to comply with the provisions of this title * * *." 28 U.S.C. § 1867(d). According to Webster's Third New International Dictionary, the meanings of "significant" and "substantial" are synonymous. The burdens under § 1863(b)(2) and under § 1867(d) would therefore seem to be the same.

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[23]See also S. Rep. No. 891, at 17:

> If the voter lists are used and supplemented where necessary, and if the procedures outlined in the bill are otherwise rigorously followed, it is no departure from the standards of the legislation that the qualified jury wheel, the venire or array, or the jury itself, may not reflect a community cross section. The act guarantees only that the jury shall be "selected at random from a fair cross section of the community." It does not require that at any stage beyond the initial source list the selection process shall produce groups that accurately mirror community makeup. Thus, no challenge lies on that basis. In short, the act attempts to achieve its cross sectional aim by insuring that the basic source list is adequate in that regard and that no procedure is employed that would impermissibly diminish the likelihood that a cross section will be attained. (footnote omitted).

If Congress really meant what it said in § 1863(b)(2) and its accompanying history,[24] then this case would clearly seem to fall within its parameters. Here there was an admission by the chief judge of the district court – the person who was in charge of the local plan for juror selection (App. 3) – that there was an underrepresentation of blacks and Chicanos (the Spanish-surnamed) in the master wheel. (App. 21, 24, quoted *supra*, at 4). Clearly the Act, just as the Fourteenth Amendment, *cf. Hernandez v. Texas*, *supra*, at 478-79, is not limited to only two classes of persons, blacks and whites. 28 U.S.C. § 1862. Therefore a "substantial" showing of underrepresentation of the Spanish-surnamed would require affirmative relief. 28 U.S.C. § 1867(d); § 1863(b)(2).

If the Act instead requires a showing of systematic exclusion of a group, then the statutory language and legislative history would be meaningless. The legislative history states that the supplementation requirement is not limited to instances where a class or segment of society has been discouraged from registering and/or voting, but it rather embraces situations where "voting patterns" make clear that the lists are deficient. S. Rep. No. 891, at 27 [quoted *supra*, at 28]. Presumably this

[24] At least one commentator has believed that the subsection indeed means what it says. See 5A J. Moore, *Federal Practice* ¶ 47.05 n. 2 [p. 2022]:

> Indeed the subsection [1863(b)(2)] provides that the plan *shall* provide a supplemental source of names in addition to voter lists when necessary to further the policy of the chapter, a provision included, undoubtedly, to avoid frustration of the fair cross-section policy in areas in which registration among certain racial or economic classes is below average. (emphasis in original).

would include instances where a segment of society chose not to register to vote, but was not actively discouraged from voting. *Id.* at 17, 27. The remarks of Representative McCulloch of the House Committee on the Judiciary bear this interpretation out:

> If purposeful discrimination were the sole basis for this legislation, perhaps the need would not be clear; but the impact of [the Act] is much greater than that of civil rights legislation.
> 114 Cong. Rec. 3992 (1968).

A 1972 amendment to section 1869(h), which previously had not required an answer to the question on the juror questionnaire concerning race and occupation, supports this view. The 1972 amendment (P.L. 92-437, 86 Stat. 740) amended this subsection to make mandatory the answers to race and occupation. Without such a requirement, it had proved impossible to "monitor and enforce nondiscrimination in the selection of Federal jurors." S. Rep. No. 92-1144, 1972 U.S. Code Cong. & Ad. News 3402, 3403. Studies had shown that up to thirty percent of the recipients of questionnaires had failed to respond to the question as to race. Because of this volume of non-response, it became "virtually impossible to detect discriminatory practices under the existing law. One cannot accurately determine whether litigants in the Federal courts are having their matters considered by jurors who represent a 'fair cross section of the community' as required by the Jury Selection Act." *Ibid.* The legislative history concludes:

> The clear purpose of [the amendment] is to end discrimination and to provide a method of enforcing the objectives of the Federal Jury

> Selection Act. This bill seeks to guarantee racial neutrality in the jury selection process. *Ibid.*

The report concluded that while the use of racial identification on juror questionnaires may have led to the discrimination found in *Alexander v. Louisiana*, 405 U.S. 625 (1972),

> the fact that such information was available enabled the selection panel's actions to be challenged. It is to insure the random selection process that the requirements of [the amendment] need to be imposed. The sole object of such indentification is to fulfill the policy objectives of the Federal Jury Selection Act. *Id.* at 3404.[25]

If data on race, etc., is needed to assure the cross-sectional goal, then clearly this goal envisions affirmative steps by the system itself to achieve as broad a cross-section as possible. Why else would it be necessary to "monitor" the results of the workings of the Act – a requirement that is the basis of the 1972 amendment to § 1869(h)? Why else would Congress in 1968 have undertaken such a marked departure from past practice? S. Rep. No. 891, at 10. It is therefore submitted that unlike the apparent interpretation made by the Ninth Circuit in *United States v. Parker, supra; United States v. Bennett; supra;* and *United States v. James, supra;* and by the Second Circuit in *United*

[25]A second 1972 amendment (P.L. 92-269, 86 Stat. 117) reduced the age of jurors from twenty-one to eighteen, also to further the cross-sectional goal. H.R. Rep. No. 92-869, 1972 U.S. Code Cong. & Ad. News 2222, 2223. It also amended the requirements of "periodic emptying and refilling" of the master jury wheel, 28 U.S.C. §1863(b)(4), to be at least every four years, beginning with a refilling no later than September 1, 1973, to include names from the 1972 general election. *Ibid.*

States v. Guzman, supra, the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, goes well beyond merely attempting to end discriminatory practices; rather, it imposes affirmative burdens and goals upon the selection system to achieve a truly "fair cross section of the community." The necessary corollary of this statutory intent is that a litigant challenging compliance with the Act does not have to demonstrate a "purposeful discrimination" on the part of the clerk or jury commissioner, but rather only has to show a significant percentage discrepancy between the proportion a group bears to the total population and the proportion on the jury lists. S. Rep. No. 891, at 17, 27; H.R. Rep. No. 1076, 1968 U.S. Code Cong. & Ad. News at 1794, 1799. Since at the very least Petitioner herein alleged a significant underrepresentation in the trial court, he was prejudiced by the court's failure to allow him to inspect the master and qualified jury wheels and other relevant documentation.

II.

SINCE PETITIONER SATISFIED BOTH THE REQUIREMENTS OF THE JURY SELECTION ACT AND THE SYSTEMATIC EXCLUSION CASES, HE SHOULD NOT HAVE BEEN DENIED ACCESS TO THE JURY LISTS AND OTHER RELEVANT DOCUMENTATION.

A. Petitioner Fulfilled the Threshold Requirements under the Act, and He Therefore Should Have Been Afforded Discovery of the Jury Documents.

The Jury Selection Act, in § 1867, sets up a procedure for challenging compliance with the Act. Petitioner complied with the requirements of § 1867(a), for he filed a timely motion to dismiss the indictment and/or quash the array on the grounds that certain segments of the society were excluded from the master and qualified jury wheels. (App. 11-12). Subsection (d) creates the following threshold requirement to discovery of non-public materials:

> Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence.

Petitioner, through counsel, filed an affidavit in support of his motion to inspect the relevant jury documentation. This affidavit reported the results of a similar challenge in the state courts which showed that the Spanish-surnamed and persons between the ages of twenty and thirty were very significantly underrepresented. (App. 15-16). Because the system used in the state courts was similar to that used by the district court herein, the statement alleged that there was probable cause to believe that similar marked disparity was present in the Federal court system. (App. 16). If true, this significant disparity would certainly constitute a "substantial failure" to comply with the provisions of the Act.[26] 28 U.S.C. §1867(a), (d). See, *e.g.*, the legislative history to §1863(b)(2), which states that "any substantial percentage deviations" from the cross-sectional goal must result in the supplementation of the voter lists with other sources. S.Rep. No. 891, at 17; H.R. Report No. 1076, *supra*, at 1794. In addition, the Colorado state courts have recognized that voter lists as the sole source of prospective jurors' names are inadequate. Colorado Rules of Jury Selection and Service, Colorado Revised Statutes, 1963, vol. 1 (1973 Cumul. Supp.). The goal of the latter rules, like that of the Jury Selection Act, is "to provide for jury service by persons selected at random from a fair cross section of all citizens qualified to serve." Rule 2, *id.* However, Rule 7(b)(i) requires the supplementation of voter registration lists with other lists, including city directories, motor vehicle registrations, and drivers' and chauffeurs' licenses. *Id.*

[26]Indeed, the Solicitor General has stated that this affidavit complied with the requirements of §1867(d). Memorandum for the United States, at 6.

Few cases have interpreted the right to discovery under § 1867(d). Those that have denied discovery can be divided into two categories: (a) those in which no sworn statement was filed, or the statement was insufficient, and (b) those cases in which the basis of the challenge was insufficient as a matter of law. In the former category are such cases as *United States v. James, supra*, 453 F.2d at 29, where no statement was filed, and *United States v. Smaldone*, 485 F.2d 1333, 1346 (CA 10 1973) *cert. denied* 94 S.Ct. 1934, *rehearing pending* (1974), in which the Court of Appeals held that only "conjecture" had been offered in support of the challenge.

In the second category falls *United States v. Guzman, supra*, 468 F.2d at 1249, where the court held that a challenge based on the underrepresentation of 24-30 year olds was insufficient under the Act. In part this was based upon the failure to demonstrate "systematic exclusion," *id.* at 1247 and in part upon the court's serious question as to whether age groups were within the reach of the Act. *Id.* at 1248 n. 6.

Here at least part of Petitioner's claims–those relating to the exclusion of blacks and Chicanos (Spanish-surnamed)–clearly falls within the ambit of 28 U.S.C. § 1862. Indeed the trial court did not doubt this aspect of the claim, but rather apparently denied discovery because it felt its concession that blacks and the Spanish-surnamed were underrepresented made any discovery of the actual lists, etc., unnecessary. (App. 24, quoted at p.4, *supra*.)

Other cases have reached the opposite result. See, for example, *United States v. Ware*, 473 F.2d 530 (CA 9 1973), which bypassed the requirement of a sworn

statement, partly because the Government did not object to the failure to file one, and partly because defense counsel had orally articulated his reasons for his challenge at the time of argument before the district court. Another decision from the Ninth Circuit, *United States v. Beaty*, 465 F.2d 1376 (CA 9 1972), held that a sworn statement is *not* required prior to discovery of the jury lists. While this construction of the statute may well be incorrect, here Petitioner *did* file a sufficient sworn statement, and therefore he should have been granted discovery of the relevant jury documentation. The Tenth Circuit, in dictum, also expressed the view that discovery was a matter of right under the 1968 Act. *United States v. Tijerina*, 446 F.2d 675, 681 n.5 (CA 10 1971).

The legislative history to this section of the statute, though brief, expresses a view in accord with Petitioner's. The Senate Report states:

> In aid of a motion challenging the selection procedure, subsection (d) of new section 1867 entitles the challenging party to present the testimony of the commissioner or clerk if these officials are available. Likewise, the challenging party may obtain relevant official records and papers which are not public or otherwise available. S.Rep. No. 891, at 35.

Since Congress anticipated that the local plan for selection would be a matter of public record, *id.* at 34, it necessarily follows that the records Petitioner was seeking fall within the purview of § 1867(d). A textual analysis of § 1867 also supports this view. Subsection (f) requires that the records used in conjunction with the jury not be disclosed, except as "may be necessary

in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section * * *."

In light of the intent of Congress to secure as broad a base for juror selection as possible, and at the same time monitor the system so that no discrimination would enter, *supra*, at 26-39, the following language from a decision under the prior statute would appear to be equally appropriate under the 1968 Act:

> We believe the District Judge erred, therefore, in not permitting inspection of the questionnaires. This evidence, designed to show the ratio of Negroes to whites on the jury lists, is pertinent to an inquiry into the question of whether there has been a systematic exclusion of Negroes because of race. While this proof is not necessarily controlling, it is, nevertheless, an important factor of substantial value and should be considered by the Court in connection with other evidence pertaining to the method of selection of persons on the jury lists. Confidentiality of the jury questionnaries must accordingly yield to this major consideration. *Mobley v. United States*, 379 F.2d 768, 773 (CA 5 1967).

Since the inspection of the jury records serves the same purpose under the 1968 Act, it was equally erroneous to deny inspection herein. It is therefore submitted that the district court's denial of the opportunity to inspect the jury documentation should be reversed, and the matter should be remanded so that Petitioner will have an opportunity to discover the records and attempt to prove his challenge.

B. Petitioner Made A Sufficient Showing of Constitutional Dimension to Warrant His Being Granted an Evidentiary Hearing and Discovery of the Jury Documentation.

It has long been the law that a conviction cannot stand if it is based upon an indictment of a grand jury or the verdict of a petit jury from which racial or economic groups or other classes have been excluded. *Alexander v. Louisiana*, 405 U.S. 625 (1972), and cases cited therein; *Hernandez v. Texas*, 347 U.S. 475 (1954); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946). The burden is on the party alleging systematic exclusion to establish a prima facie case of discriminatory jury selection, but a prima facie case is established when a significant disparity is established between the proportion of the group(s) in the total population and the proportion that the group bears to the total called for jury service. *Hernandez v. Texas, supra*, at 480-81; *Patton v. Mississippi*, 332 U.S. 463 (1947). Neither complete exclusion of a group is necessary to carry the burden of establishing a prima facie case, *cf. Whitus v. Georgia*, 385 U.S. 545 (1967), nor is specific proof of bad faith required. *Avery v. Georgia*, 345 U.S. 559 (1953). While no jury need be a perfect statistical mirror of society, *Swain v. Alabama*, 380 U.S. 202 (1965), token inclusion is equally forbidden. *Brown v. Allen*, 344 U.S. 443, 471 (1953).

The Solicitor General has contended that Petitioner did not really make allegations of systematic exclusion, that the thrust of Petitioner's contention in the trial court was that the use of voter lists resulted in underrepresentation, i.e., a disparity between the population percentage and the jury wheel percentage,

rather than that the lists were compiled in a discriminatory manner or that discriminatory means of selection from the lists were used. Memorandum for the United States, at 5-6. The motion to dismiss the indictment and/or quash the array (App. 11-12) admittedly could have been more artfully drafted, but the real thrust of Petitioner's claim was that the voter registration lists were being used in a discriminatory fashion. This argument is perhaps better illustrated by the hearing on Petitioner's motions in the district court. At that time counsel went further into the results of his state court hearing which was the basis for his affidavit in support of Petitioner's motion to inspect the jury wheels, etc. He showed that the voter registration lists had been anything but even-handed in their results, and he also pointed out that the Colorado Supreme Court had recognized the need for further supplementation of the voter lists. (App. 18-21). Finally, he drew the district court's attention to a Bureau of Census study on the 1968 national election.[27] This study compared the characteristics of the total population with the characteristics of registered voters, and it found that those of lower income, education, job status, youth, and the poor were underrepresented.

Petitioner, moreover, was attempting to comply with the "rule of exclusion" of *Norris v. Alabama*, 294 U.S. 587 (1935) and *Hernandez v. Texas, supra*, by showing that the proportion of blacks and Spanish-surnamed on the jury wheels was much less than their respective

[27]U.S. Department of Commerce, Bureau of Census, Population Characteristics, Voting and Registration in the Election of November, 1968, Series P-20, No. 192 (1969).

percentages in the population as a whole.[28] While no mathematical standards have been set to determine systematic exclusion. *Alexander v. Louisiana, supra,* at 630, most of the successful-challenges have involved the presentation of statistical evidence. Such a showing was made impossible here by the district court's denial of the motion to inspect. There was no doubt in the district court's mind as to whether blacks or the Spanish-surnamed were a cognizable group, *cf. Hernandez v. Texas, supra,* at 479 n.9, so that could not have been the basis for the denial of the motion to inspect.[29]

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[28]The inquiry of counsel was focused primarily upon Chicanos, the Spanish-surnamed, for at the time of Petitioner's indictment the list being used did not require a response on the juror questionnaire as to race. 28 U.S.C. §1869(h) (1968). The 1970 Census showed that the Spanish-surnamed or Spanish-speaking over the age of twenty-one represented 10.4% of the total over-21 population of the State of Colorado. The Plan for Selection used by the district court divided the State into three "divisions" – Denver, Grand Junction, and Pueblo. (App. 2-3). Grand Juries were summoned proportionally from the three divisions: 67% from the Denver division, 20% from Pueblo, and 13% from Grand Junction. The statistics in counties reporting 400 or more Spanish-surnamed or Spanish-speaking show that the proportion in the Denver division was 8.9% of those over 21 (77,411 of 864,213); the Pueblo division was 16.5% (46,875 of 284,493); and the Grand Junction division was 9.57% (8680 of 90,684). U.S. Dept. of Commerce, Bureau of Census, General Social and Economic Characteristics – Colorado, Series FC (1), No. C7 (Colo.), Tables 48 and 129; U.S. Dept. of Commerce, Bureau of Census, General Population Characteristics – Colorado, Series PC(1) No. B7 (Colo.) (1971), Table 35.

[29]The Colorado Supreme Court has also recognized that the Spanish-surnamed are a cognizable group. *Montoya v. People,* 141 Colo. 9, 345 P.2d 1062 (1959).

The problem presented by the instant case is similar to that in *United States v. DeAlba-Conrado*, 481 F.2d 1266 (CA 5 1973). There the defendant challenged the petit jury, but only after it had already been empanelled and sworn. The trial court invited counsel to renew his objection in a motion for new trial, but this was not done. The Fifth Circuit therefore held that the defendant's statutory challenge under the Jury Selection Act was barred by the timeliness requirements of § 1867(a). However, the Court of Appeals also felt that defendant's challenge to the denial of jurors with "Latin names", *id.* at 1269, while perhaps not making a strictly cognizable constitutional claim, still had "sufficient constitutional implications" to require a remand and an evidentiary hearing. *Id.* at 1270.

Similarly, at the very least, Petitioner's claims of exclusion of blacks and Chicanos also has "sufficient constitutional implications," regardless of the intent and scope of the Jury Selection Act, so as to require a remand for an evidentiary hearing, wherein Petitioner will have an opportunity to inspect the jury records and attempt to prove his claim.

CONCLUSION

For the reasons stated above, Petitioner respectfully submits that the district court's denial of the opportunity to inspect the jury wheels should be reversed and the case remanded for an evidentiary hearing on the merits of Petitioner's claims.

Respectfully submitted,

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APPENDIX A

I. 28 U.S.C. §§ 1861-1869, 1871 (1968)

§ 1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

§ 1862. Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

§ 1863. Plan for random jury selection

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the

plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall—

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. If the plan establishes a jury commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: *Provided, however,* That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in the judicial district or division for which he is appointed. Each citizen jury commissioner shall receive compensation to be fixed by the district court plan at a rate not to exceed $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources

of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title.

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times.

(5) specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only

if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

(7) fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefor, be excused from jury service on the ground of undue hardship in traveling to the place where court is held.

(8) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(9) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and twenty days of the date of enactment of the Jury Selection and Service Act of 1968. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time

thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

§ 1864. Drawing of names from the master jury wheel; completion of juror qualification form

(a) From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The clerk or jury commission shall prepare an alphabetical list of the names drawn, which list shall not be disclosed to any person except pursuant to the district court plan and to sections 1867 and 1868 of this title. The clerk or jury commission shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk or jury commission by mail within ten days. If the person is unable to fill out the form, another shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk or jury commission shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the clerk or jury commission within ten days. Any person who fails to return a completed juror qualification form as instructed may be summoned by the clerk or jury commission forthwith to appear before the clerk or jury commission to fill out a juror qualification form. A person summoned to appear because of failure to return a juror qualification form as instructed who personally appears and executes a juror qualification form before the clerk or jury commission may, at the discretion of the district court,

except where his prior failure to execute and mail such form was willful, be entitled to receive for such appearance the same fees and travel allowances paid to jurors under section 1871 of this title. At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence of the jury commission or the clerk or the court, at which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the clerk or jury commission may be noted on the juror qualification form and transmitted to the chief judge or such district court judge as the plan may provide.

(b) Any person summoned pursuant to subsection (a) of this section who fails to appear as directed shall be ordered by the district court forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such order or who fails to show good cause for noncompliance with the summons may be fined not more than $100 or imprisoned not more than three days, or both. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than three days, or both.

§ 1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

§ 1866. Selection and summoning of jury panels

(a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place in such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

(b) When the court orders a grand or petit jury to be drawn, the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors.

Each person drawn for jury service may be served personally, or by registered or certified mail addressed to such person at his usual residence or business address.

If such service is made personally, the summons shall be delivered by the clerk or the jury commission or their duly designated deputies to the marshal who shall make such service.

If such service is made by registered or certified mail, the summons may be served by the clerk or jury commission or their duly designated deputies who shall make affidavit of service and shall file with such affidavit the addressee's receipt for the registered or certified summons. If such service is made by the marshal, he shall attach to his return the addressee's receipt for the registered or certified mail. As amended Dec. 11, 1970, 84 Stat. 1408.

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5), (6), or (7) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be (1) excused by the court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person shall be summoned again for jury service under subsections (b) and (c) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title. The number of persons excluded under clause (5) of this subsection shall not exceed one per centum of the number of persons who return executed jury qualification forms during the period, specified in the plan, between two consecutive fillings of the master jury wheel. The names of persons excluded under clause (5) of this subsection, together with detailed explanations for the exclusions, shall be forwarded immediately to the judicial council of the circuit, which shall have the power to make any appropriate order, prospective or retroactive, to redress any misapplication of clause (5) of this subsection, but otherwise exclusions effectuated under such clause shall not be subject to challenge under the provisions of this title. Any person excluded from a particular jury under clause (2), (3), or (4) of this subsection shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on such other jury.

(d) Whenever a person is disqualified, excused, exempt, or excluded from jury service, the jury commission or clerk shall note in the space provided on his juror qualification form or on the juror's card drawn from the qualified jury wheel the specific reason therefor.

(e) In any two-year period, no person shall be required to (1) serve or attend court for prospective service as a petit juror for a total of more than thirty days, except when necessary to complete service in a particular case, or (2) serve on more than one grand jury, or (3) serve as both a grand and petit juror.

(f) When there is an unanticipated shortage of available petit jurors drawn from the qualified jury wheel, the court may require the marshal to summon a sufficient number of petit jurors selected at random from the voter registration lists, lists of actual voters, or other lists specified in the plan, in a manner ordered by the court consistent with sections 1861 and 1862 of this title.

(g) Any person summoned for jury service who fails to appear as directed shall be ordered by the district court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than three days, or both.

§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b) (4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 1868. Maintenance and inspection of records

After the master jury wheel is emptied and refilled pursuant to section 1863(b) (4) of this title, and after all persons selected to serve as jurors before the master wheel was emptied have completed such service, all records and papers compiled and maintained by the jury commission or clerk before the master wheel was emptied shall be preserved in the custody of the clerk for four years or for such longer period as may be ordered by a court, and shall be available for public inspection for the purpose of determining the validity of the selection of any jury.

§ 1869. Definitions

For purposes of this chapter—

(a) "clerk" and "clerk of the court" shall mean the clerk of the district court of the United States or any authorized deputy clerk;

(b) "chief judge" shall mean the chief judge of any district court of the United States;

(c) "voter registration lists" shall mean the official records maintained by State or local election officials of persons registered to vote in either the most recent State or the most recent Federal general election, or, in the case of a State or political subdivision thereof that does not require registration as a prerequisite to voting, other official lists of persons qualified to vote in such election. The term shall also include the list of eligible voters maintained by any Federal examiner pursuant to the Voting Rights Act of 1965 where the names on such list have not been included on the official registration lists or other official lists maintained by the appropriate State or local officials. With respect to the districts of Guam and the Virgin Islands, "voter registration lists" shall mean the official records maintained by territorial election officials of persons registered to vote in the most recent territorial general election;

(d) "lists of actual voters" shall mean the official lists of persons actually voting in either the most recent State or the most recent Federal general election;

(e) "division" shall mean: (1) one or more statutory divisions of a judicial district; or (2) in statutory divisions that contain more than one place of holding court, or in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district court plan shall determine: *Provided*, That each county, parish, or similar political subdivision shall be included in some such division;

(f) "district court of the United States", "district court", and "court" shall mean courts constituted under chapter 5 of title 28, United States Code, section 22 of the Organic Act of Guam, as amended (64 Stat. 389; 48 U.S.C. 1424), section 21 of the Revised Organic Act of the Virgin Islands (68 Stat. 506; 48 U.S.C. 1611), and section 1 of title 3, Canal Zone Code: *Provided*, That for purposes of sections 1861, 1862, 1866(c) and (d), and 1867 of this chapter these terms shall include the District of Columbia Court of General Sessions and the Juvenile Court of the District of Columbia;

(g) "jury wheel" shall include any device or system similar in purpose or function, such as a properly programed electronic data processing system or device;

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, education, length of residence within the judicial district, distance from residence to place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as juror, is able to read, write, speak and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable by imprisonment for more than one year, or has been convicted in any State or Federal court of record of a crime punishable by imprisonment for more than one year and has not had his civil rights restored by pardon or amnesty. The form shall request, but not require, the race and occupation of a potential juror and any other matter not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form also shall elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his race, color, religion, national origin, economic status, or occupation is not a prerequisite to his qualification for jury service, and that such information need not be furnished if the person finds it objectionable to do so;

(i) "public officer" shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office.

* * *

§ 1871. Fees

Grand and petit jurors in district courts or before United States commissioners shall receive the following fees, except as otherwise expressly provided by law:

For actual attendance at the place of trial or hearing and for the time necessarily occupied in going to and from such place at the beginning and end of such service or at any time during the same, $20 per day, except that any juror required to attend more than thirty days in hearing one case may be paid in the discretion and upon the certification of the trial judge a per diem fee not exceeding $25 for each day in excess of thirty days he is required to hear such case.

For the distance necessarily traveled to and from a juror's residence by the shortest practicable route in going to and returning from the place of service at the beginning and at the end of the term of service 10 cents per mile, plus the amount expended for tolls, for toll roads, for toll tunnels, and for toll bridges; and for additional necessary daily or other interim travel during the term of service the juror shall be allowed for such travel 10 cents per mile, plus the amount expended for tolls, for toll roads, for toll tunnels, and for toll bridges, but not to exceed the subsistence allowance which would have been paid him if he had remained at the place of holding court overnight or during temporary recess, and if daily travel appears impracticable, subsistence of $16 per day shall be allowed, including the time necessarily occupied in going to and returning from the place of attendance. Whenever in any case the jury is ordered to be kept together and not to separate, the cost of subsistence during such period shall be paid by the United States marshal upon the order of the court in lieu of the foregoing subsistence allowance.

Jury fees and travel and subsistence allowances provided by this section shall be paid by the United States marshal on the certificate of the clerk of the court, and in the case of jury fees in excess of $20 per diem, when allowed as hereinabove provided, on the certificate of the trial judge.

Grand and petit jurors in the district courts for the districts of Guam and the Canal Zone shall receive the same fees and allowances provided in this section for grand and petit jurors in other district courts of the United States.

II. 28 U.S.C. §1865(b)(1) (1972):

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

III. 28 U.S.C. § 1869(h) (1972):

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, race, occupation, education, length of residence within the judicial district, distance from residence to place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as juror, is able to read, write, speak, and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable by imprisonment for more than one year, or has been convicted in any State or Federal court of record of a crime punishable by imprisonment for more than one year and has not had his civil rights restored by pardon or amnesty. The form shall request, but not require, any other information not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form shall also elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his religion, national origin, or economic status is not a prerequisite to his qualification for jury service, that such information need not be furnished if the person finds it objectionable to do so, and that information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service.